STATE OF NEW YORK
CITY OF ROCHESTER

COUNTY OF MONROE
CITY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

ANSWERING
AFFIRMATION

NIKKI G. CRAFT, KATHLEEN F. REILLY,
DEBORAH A. SEYMOUR, ELISE JO TOOLEY,
and LYNN E. ZICARI.

Defendant.

THOMAS J. BRILBECK, affirms and states that he is an Assistant District Attorney and for the County of Monroe, and as such, upon information and belief, submits this affirmation in response to defendant's motion.

1. I am an Assistant District Attorney for the County of Monroe presently assigned responsibility for the prosecution of this case.

2. Unless otherwise stated, the source of my information and belief, consists of police reports and other records in our file.

3. I deny every allegation in the defense affidavit not specifically conceded.

4. I oppose each request for relief not specifically conceded.

DENIAL OF FACTUAL ALLEGATIONS

Pursuant to People v. Gruden, 42 NY 2d 214, the People specifically deny each, every, any and all factual allegations contained in motions for the defense unless

admitted in a part of parts of this Answering Affirmation by the People to be true or are "conclusively substantiated by unquestionable documentary proof." CPL 210.45 (4) (c), as submitted by defense.

STATEMENT OF FACTS

On or about June 21, 1986, the defendants, along with two other females, removed their shirts in Cobbs Hill Park, Rochester, New York, exposing their breasts. Prior to the incident, representatives of the women apprised the Rochester Police Department of their intent to protest New York Law prohibiting exposure of a woman's breasts in a public place. Cobbs Hill Park is a park open to the public and operated by the City of Rochester.

The women were arrested and charged with a violation of Section 245.01 of the Penal Law of the State of New York (Exposure of a Person), and issued appearance tickets to appear in Rochester City Court for arraignment.

The defendants, by this motion, challenge the constitutionality of Section 245.01 in several respects. The People deny each and every allegation contained within the defendant's moving papers, and respectfully request the Court to deny their motion in all respects.

I.

SECTION 245.01 OF THE PENAL LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE NEW YORK CONSTITUTION NOR OF THE UNITED STATES CONSTITUTION

The question of unconstitutionality of a statute, once raised, must be proven by the defendant beyond a reasonable doubt. People v. Karns, 81 Misc. 2d 186, 199 (Rochester City Court, 1975). See also Matter of Ban Berkel v. Power, 16 NY 2d 37, 40; People v. Pagnotta, 25 NY 2d 333. The general principle is that a law is to be declared unconstitutional only as a last resort. Matter of Roosevelt Raceway v. Monoghan, 9 NY 2d 293.

The fact that a statute relates solely to the improper exposure of females does not thereby render the statute as violative of the equal protection clause of our constitution.. In People v. Gilmore, 120 Misc. 2d 741, the Court stated: "to constitute a denial of equal protection there must be an arbitrary systematic course of discrimination, purposely designed to favor one person or class over another, with no rational basis for the distinction." 120 Misc. 2d at 747. Legislative distinctions are proper so long as they are based upon reason. Farrington v. Pinckney, 1 NY 2d 74.

The present statute forbids the exposure of private or intimate parts of a person (male or female) in a public place. The private or intimate part of a female includes that portion of the breast which is below the top of the areola. The legislature, by including the female breast in

its definition of private or intimate parts, merely reflects the current standards of the community in defining what are "private" or "intimate" parts of a person's body, as well as preventing the possibility of indecent conduct and avoid public disturbance and inconvenience.

There being a rational basis for the statute, the defendant's bear the burden of proving the unconstitutionality of the statute beyond a reasonable doubt. Having failed to accomplish this burden in their moving papers, the Court should summarily deny their motion.

II.

THE STATUTE IS NOT VAGUE NOR OVERBROAD, AND THEREBY DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE NEW YORK CONSTITUTION NOR THE FEDERAL CONSTITUTION

The notion of due process requires that sanctions be imposed on an individual only if he, as "a reasonable man subject to the statute would be informed of the nature of the offense prohibited and what is required of him. Such warning must be unequivocal but this requirement does not preclude the use of ordinary terms to expect ideas which find adequate interpretation in common usage and understanding." People v. Byron, 17 NY 2d 64, 67; Rose v. Locke, 423 U.S. 48; People v. Scott, 26, NY 2d 286.

In addressing the void-for-vagueness doctrine relative to obscenity, the United States Supreme Court has stated "the constitution does not require impossible standards, all that is required is that the language 'conveys sufficiently

definite warnings as to the proscribed conduct when measured by common understanding and practices'". Roth v. United States, 354 U.S. 476, 491.

The test of a statute's vagueness for due process purposes is to be made with respect to the actual conduct of the actor who attacks the statute and not with respect to hypothetical situations at the periphery of the statute's scope or with respect to the conduct of other parties who might not be forewarned by the broad language. In People v. Harris, 129 Misc. 2d 577 (1985), the court upheld the constitutionality of Section 245.01, and denied the defendant's motion to declare the statute violative of due process as being vague and overbroad. See also United States v. Powell, 423, U.S. 87, 93 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975); and Parker v. Levy, 417 U.S. 733,. 756 (1974).

In the present case, the defendants deliberately removed their shirts in public in open defiance of Section 245.01. They clearly realized such action would violate the statute. There is no allegation that they were unaware such action might lead to their arrest. As a result, the defendant's lack standing to challenge the statute as unconstitutional for vagueness.

Additionally, the statute does not fail for being overly broad. The statute does not permit a female from appearing in public with her breasts exposed or uncovered unless (1) she is breast feeding an infant, or (2) she is entertaining

or performing in a play, exhibition, show or entertainment. The class of persons to whom the statute applies, as well as the exceptions, are readily definable and identifiable, and as a consequence the statute is not overly broad.

Finally, whether the statute intrudes upon individual lifestyles, dress,exercise or morals is a question which clearly belongs before the legislature, and does not go to the underlying constitutionality of the law. People v. Karns, upra at 197-198.

For these reasons, the People request the Court to deny defendant's motion.

III.

THE STATUTE DOES NOT VIOLATE THE DEFENDANTS' RIGHTS UNDER THE FIRST OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

It has long been held that the protective rights of the First and Fourteenth Amendments, when outside the scope of actual spoken or written words, are more amenable to state regulatory powers. People v. Karns, supra at 192. In California v. LaRue, 409 U.S. 109, the Court (at 117) stated:

> But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct"or "action". Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage Co., 336 U.S. 490 (1949). In O'Brien, supra,the Court suggested that the extent to which "conduct" was protected by the First Amendment depended on the presence of a of a "communicative element", and stated: "We cannot accept the view that an apparently limitless variety of conduct

can belabeled "speech" whenever the person engaging in the conduct intends thereby to express an idea."
391 U.S. at 376.

In the present case, the defendants contend that by baring their breasts in a public place, and violating the statute, they are engaging in protected "speech". However, they have failed to allege in what manner their arrest has restrained the free dissemination of information, communication, or ideas. In fact the defendants have never been restrained to express their opinion or ideas in the spoken or written form, which remain the most protected forms of speech.

For these reasons, the People request the Court to deny defendants' motion.

IV.

THE STATUTE DOES NOT VIOLATE THE DEFENDANTS' RIGHTS UNDER THE NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The defendants contend that "lifestyle, dress, morals, exercise and philosophy" are "unenumerated expressions" protected by the Ninth Amendment, and that as a result Section 245.01 violates this amendment by preventing freedom of these "expressions". However, the question of whether a law, which regulates when a female may bare her breasts, infringes on a segment of the population's lifestyle, dress, morals, exercise, or philosophy, is a question which ultimately should remain with the legislature. The State Legislature has enacted Section 245.01, and has in fact

amended it several times to conform to "lifestyle, dress, morals, exercise, and philosophy."

For these reasons, the defendants have failed to prove the unconstitutionality of the statute beyond a reasonable doubt. The People request the court to deny defendants' motion.

BILL OF PARTICULARS

For defendant's request for a Bill of Particulars, I respond as follows, using the lettering/numbering appearing in the defendant's attorney's affidavit:

a. June 21, 1986, at approximately 2:45 p.m., at Cobbs Hill Park, Rochester, New York.

b. Beyond the scope of a Bill of Particulars.

c. Defendants, while in a public place, exposed a private or intimate part of their bodies, to wit: their breasts.

d. Beyond the scope of a Bill of Particulars.

e. Both.

SANDOVAL

Under People v. Sandoval, 34 NY 2d 371, it is the responsibility of the defendant to show "that the prejudicial effect of the admission of evidence..." (of prior bad acts) for impeachment purposes would so far outweigh the probative worth of such evidence of the issue of credibility as to warrant its exclusion." 34 N.Y. 2d 371, 378 (1974); People v. Mackey, 49 N.Y. 2d 274, 282 (1980). Certainly the extent to which the defendant has placed his interests above that of

society in the past is probative of his veracity on the witness stand and in this case such value outweighs any possible prejudice.

The burden is on the defendant to come forward with those acts which he does not wish to be examined. People v. Duffy, 36 N.Y. 2d 258, 263 (1975); People v. Sandoval, supra at 378; People v. Poole, 52 AD 2d 1010 (3rd Dept. 1976). The People oppose a hearing until such time as that burden has been met and then consent to the hearing only to the extent that the defendant has apprised the Court and counsel of the specific events sought to be excluded.

The defendant's arrest record has been provided in discovery materials.

BRADY

I am familiar with my continuing obligation under the rule of Brady v. Maryland, 373 U.S. 83. As a result, I will provide defense counsel with all material which may fall within the scope of Brady when I become aware of its existence.

PRECLUSION OF FURTHER MOTIONS

The People move that the defendant should be precluded from any further motions pursuant to CPL Section 255.20.

READINESS

The People are ready for trial in this matter. People v. Hamilton , 46 N.Y. 2d 932 (1979), People v. Kendzia, 64 NY 2d 331, 338, (1985).

WHEREFORE, the People respectfully request that the defendant's motion be denied where so indicated.

Affirmed under penalty of perjury pursuant to Section 2106 of the CPLR.

Respectfully submitted,

HOWARD R. RELIN
Monroe County District Attorney

THOMAS J. BRILBECK
Assistant District Attorney

Dated: July 18, 1986
Rochester, New York

WHEREFORE, the People respectfully request that the defendant's motion be denied where so indicated.

Affirmed under penalty of perjury pursuant to Section 2106 of the CPLR.

Respectfully submitted,

HOWARD R. RELIN
Monroe County District Attorney

THOMAS J. BRILBECK
Assistant District Attorney

Dated: July 18, 1986
Rochester, New York

STATE OF NEW YORK COUNTY OF MONROE
CITY COURT CITY OF ROCHESTER

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

NIKKI G. CRAFT,
KATHLEEN F. REILLY,
DEBORAH A. SEYMOUR,
ELISE JO TOOLEY,
LYNN E. ZICARI,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF MONROE)

DAVID R. MOSS, being duly sworn, deposes and says that:

1. I am the attorney for the above-named defendants. I make this affidavit in support of the relief requested in the annexed notice of motion, and for such other and further relief as this Court may deem just and proper.

2. Unless otherwise stated, the facts stated herein are based on information and belief. The sources and grounds for affiant's belief are conversations held among affiant and the defendants, as well as the various and sundry papers filed in connection with this incident.

3. The said defendants were arrested and charged with the

offense of exposure of a person in violation of section 245.01 of the Penal Law in the City of Rochester on or about the 21st day of June, 1986. Copies of the informations are annexed hereto as "Exhibit A."

4. Arraignment of the defendants on the above-mentioned charge took place in this Court on the 23d day of June, 1986; to this date, no plea of guilty has been entered by said defendants, nor has a trial been commenced as to the aforementioned charge. The matter is currently scheduled for motions on July 8, 1986.

THE INFORMATIONS ARE DEFECTIVE PURSUANT TO SECTION 170.35 OF THE PENAL LAW IN THAT THE STATUTE DEFINING THE OFFENSE CHARGED IS UNCONSTITUTIONAL.

5. Section 170.30(a)(1) of the Criminal Procedure Law provides that a local criminal court may, upon motion of the defendant after arraignment, dismiss an information upon the ground that it is defective within the meaning of section 170.35 of the Criminal Procedure Law.

6. Section 170.35 of the Criminal Procedure Law states that an information is defective within the meaning of section 170.30(a)(1) of the Criminal Procedure Law when the statute defining the offense charged is unconstitutional or otherwise invalid.

7. Section 245.01 of the Penal Law provides that:

A person is guilty of exposure if he appears in a

public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

8. Section 245.01 of the Penal Law is unconstitutional, both on its face and as applied to defendants, in that:

(a) it violates the equal protection clause of the New York State Constitution, Article I, Section 11, which provides in pertinent part that: "No person shall be denied the equal protection of the laws of this State or any subdivision thereof." Section 245.01 of the Penal Law permits men to go top-free in public places, but forbids a similar freedom for women. This arbitrary, systematic course of discrimination against the defendants constitutes a denial of equal protection by favoring the actions of one class, males, over those of another, females.

(b) it violates the equal protection clause of the fourteenth amendment to the United States Constitution, which provides in pertinent part that: "No State shall . . . deny any person within its jurisdiction the equal protection of the laws." Section 245.01 of the Penal Law threatens women, but not men, with prosecution for baring their chests in a public place. Such a gender-based classification is permissible only where it furthers an important governmental interest. The State can claim no

important governmental interest to support section 245.01's gender-based classification.

(c) it is vague and overbroad in violation of the due process and free speech guarantees of the New York State Constitution, Article I, Sections 6 and 8. Article I, Section 6 of the New York State Constitution provides in part that: "No person shall be deprived of life, liberty or property without due process of law." This provision requires that citizens be given adequate warning of what a law requires before they can be required to conform their conduct to the dictates of the law. People v. New York Trap Roch Corp., 57 N.Y.2d 371. Section 245.01 of the Penal Law is unconstitutionally vague in that it fails to provide the defendant with sufficient notice to distinguish patently criminal from permissible behavior. In particular, the terms, "This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment" are insufficient to advise a person of acceptable conduct.

In addition, section 245.01 of the Penal Law is overbroad in that it has the chilling effect of prior restraint upon traditionally protected rights of speech and expression under Article I, Section 8 of the New York State Constitution. The statute exempts only live entertainment and breastfeeding from the class of proscribed criminal conduct, placing at risk traditionally protected conduct which may be political,

educational, scientific, religious, or artistic. The statute is also intrusive upon individual lifestyle, dress, exercise, and morals.

(d) it is vague and overbroad in violation of the first and fourteenth amendments to the United States Constitution. It is an essential element of due process of law that no person shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. United States v. Harris, 347 U.S. 612. Section 245.01 of the Penal Law is unconstitutionally vague in that it fails to provide the defendant with sufficient notice to distinguish patently criminal from permissible behavior. In particular, the terms "This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment" are insufficient to advise a person of acceptable conduct.

In addition, section 245.01 of the Penal Law is overbroad in that it has the chilling effect of prior restraint upon traditionally protected first amendment conduct. The statute exempts only live entertainment and breastfeeding from the class of proscribed criminal conduct. At risk is traditionally protected conduct which may be political, educational, religious, scientific, or artistic. The statute is also intrusive upon individual lifestyle, dress, exercise, and morals.

(e) it violates defendants' right to freedom of speech and freedom of expression under the New York State Constitution, Article I, Section 8, which provides in pertinent part that: "No law shall be passed to restrain or abridge liberty of speech or of the press." Section 245.01 of the Penal Law restrains the free dissemination of information, communication and ideas, and penalizes only women who bare their breasts, but not men, in the exercise of such liberty. Absent a compelling state interest to justify the restriction of such constitutionally protected rights, the statute is void.

(f) it violates defendants' right to freedom of speech and freedom of expression under the first and fourteenth amendments to the United States Constitution. Section 245.01 of the Penal Law restrains the free dissemination of information, communication and ideas, and penalizes only women who bare their breasts, but not men, in the exercise of such liberty. Absent a compelling state interest to justify the restriction of such constitutionally protected rights, the statute is void.

(g) it violates defendants' fundamental rights under the ninth amendment to the United States Constitution, which provides that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Section 245.01 of the Penal Law holds women criminally responsible for choosing to appear top-free in a public place. Lifestyle, dress, morals, exercise, and philosophy are

unenumerated expressions of fundamental human rights protected by the ninth amendment as retained by the people. Absent a compelling state interest in restricting such constitutionally protected rights, the statute is void.

WHEREFORE, the defendants request an order pursuant to sections 170.30(a)(1) and 170.35 of the Criminal Procedure Law dismissing the informations as defective or, in the alternative, a hearing.

REQUEST FOR BILL OF PARTICULARS.

9. With respect to that part of this motion which seeks a bill of particulars, I believe that I cannot adequately prepare or conduct a defense without being supplied the following information by the District Attorney:

(a) The exact date, time and place at which the crime is alleged to have occurred;

(b) The name of the alleged victim. People v. Langford, 16 N.Y.2d 32, 261 N.Y.S.2d 873 (1965);

(c) The specific acts allegedly performed by the defendants. People v. Iannove, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978); People v. Schubert, 140 Misc. 689, 251 N.Y.S. 390 (1931);

(d) The names of all prosecution witnesses. People v. Robinson, 75 Misc. 2d 477, 347 N.Y.S.2d 860.

(e) Whether the People intend to prove at trial that the

defendants acted as principals, accomplices or both.

SANDOVAL.

10. Under the authority of People v. Sandoval, 34 N.Y.2d 371, the defendants request that the District Attorney be precluded from asking any questions concerning the arrest record, conviction record or any prior immoral or vicious acts. Affiant believes that the presentation of such information in this case would greatly prejudice the defendants far beyond any probative value it could possibly have. In the alternative, defendants request a hearing as to any such evidence that the prosecution seeks to introduce at trial.

11. Under the authority of section 160.40 of the Criminal Procedure Law, the defendants request that the Court furnish them with copies of their division of criminal justice services reports so as to enable them to prepare for a Sandoval hearing.

BRADY MATERIALS.

12. With respect to that portion of this motion seeking delivery to the attorney for the defendants of all evidence favorable to the defendants, or evidence which may be favorable to them, affiant believes that the holding of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, requires the District Attorney to deliver all such potentially favorable evidence to the affiant, and the affiant requests that he do so.

13. Such information should include, but not be limited to:

(a) Any information to the effect that all or some of the evidence which may be utilized by the People at trial was illegally or improperly obtained or was obtained even partially as the result of the improper acquisition of some other evidence;

(b) Any evidence, information, testimony, transcripts, or statements indicating that the defendants herein did not commit the crime charged in the informations;

(c) Any evidence, information, testimony, transcripts, or statements indicating that any prospective prosecution witness on any occasion gave false, misleading or contradictory information regarding the charge at bar, or any related matters to persons involved in law enforcement or to their agents or informers;

(d) Any evidence, information, testimony, transcripts, or statements indicating that any prospective prosecution witnesses have given statements contradictory to one another;

(e) Any and all information, in whatever form available, supporting the position that the defendants did not commit the crime alleged in the information.

LEAVE TO MAKE FURTHER MOTIONS.

14. The defense has endeavored to encompass within this omnibus motion all possible pre-trial prayers for relief. Affiant

respectfully requests that this Court grant leave to apply for such further and future relief as may be deemed justified, should facts and circumstances not now within affiant's knowledge indicate that such additional motions are warranted.

WHEREFORE affiant respectfully prays that this Court grant the relief requested, as well as such other and further relief as this Court may deem just and proper.

David R. Moss

Subscribed and sworn to
before me this 8th
day of July, 1986

Betty M. Clelland
Notary Public

Betty M. Clelland, Notary Public
State of New York, County of Monroe
Term Expires ~~2/88~~ 11/30/88